Energy Automation Systems, Inc. v. Xcentric Ventures, LLC et al Doc. 57

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ENERGY AUTOMATION SYSTEMS, INC.,	)	
Plaintiff,	)	
v.	)	**CIVIL ACTION NO. 3-06-1079**
XCENTRIC VENTURES, LLC, d/b/a BADBUSINESS BUREAU and/or BADBUSINESSBUREAU.COM and/or RIP-OFF REPORT and/or RIPOFFREPORT.COM, and EDWARD MAGEDSON a/k/a ED MAGEDSON,	)	**Judge Trauger** **Magistrate Judge Griffin** **JURY DEMAND**
Defendants.	)	

INITIAL CASE MANAGEMENT ORDER

Pursuant to Local Rule 16(d)(2), Plaintiff, Energy Automation Systems, Inc. ("EASI"), and Defendant, Xcentric Ventures, LLC, d/b/a Badbusiness Bureau and/or badbusinessbureau.com and/or Rip-Off Report and/or ripoffreport.com ("Xcentric"), jointly submit this Initial Case Management Order.

A. JURISDICTION:

EASI asserts that jurisdiction is proper under 28 U.S.C. § 1331 and 28 U.S.C. § 1332 and that venue is proper under 28 U.S.C. § 1391(a) as to all Defendants. Defendant Xcentric contends that it is not subject to personal jurisdiction in this district and filed a Motion to Dismiss for Lack of Personal Jurisdiction. On May 25, 2007, the Court denied

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Xcentric's Motion. To the extent the Motion to Dismiss addressed the merits of the case, the Court converted the motion to a motion for summary judgment.

B. SERVICE OF PROCESS

All Defendants have been served.

C. BRIEF THEORIES OF THE PARTIES:

1. Plaintiff:

Plaintiff EASI is engaged in the distribution of equipment that reduces the volume of electricity consumed by electric motors, lighting equipment, air conditioning and refrigeration equipment, and other machinery and equipment powered by electricity. While EASI engages in some direct sales to end-users, EASI sells the majority of its products through a network of authorized resellers.

Defendants operate a website identified by and located through either of two domain names, ripoffreport.com and badbusinessbureau.com (the "Website"). The Website purports to expose companies and individuals who "ripoff" consumers. The Website contains numerous false and deceptively misleading statements about EASI, its dealerships and its officers and employees, including statements that EASI is a "complete" and "long running" "scam," a "damn scam ripoff business from hell," a business engaged in "fraud," and describes EASI's Chief Executive Officer as a "consumer fraud ripoff artist con man."

Unlike operators of a passive internet bulletin board, Defendants take an active role in creating and/or developing defamatory content on the Website about EASI. Defendants list EASI on the Website's "Top Rip-Off Links," featured on the Website's homepage. Defendants have created and/or listed various "Categories and Topics" by which targeted companies and individuals are organized on the Website, including the categories "Corrupt Companies" and "Con Artists." Upon information and belief, Defendants have also developed and/or created on the Website titles, various headings, and/or editorial messages concerning individuals and/or companies targeted by the reports. Despite repeated requests to remove the defamatory and misleading content from the Website, Defendant Magedson demanded payment for remedying the falsities pursuant to the "Rip-off Report Corporate Advocacy Business Remediation & Customer Satisfaction Program" offered on the Website.

Defendants' conduct has caused EASI to lose at least two dealership sales, which individually sell for approximately $40,000.00, and has damaged EASI's business and reputation. EASI alleges that Defendants' conduct constitutes common law defamation, interference with business relations and civil conspiracy, and violates the Tennessee Consumer Protection Act, T.C.A. §§ 47-18-101 et seq. EASI seeks preliminary and permanent injunctive relief requiring Defendants to remove from the Website any false and defamatory statements concerning EASI, its dealerships, or its employees, and prohibiting Defendants from later publishing such statements on the Website. EASI further seeks compensatory, punitive and treble damages, as well as attorneys' fees, costs and such other and further general relief which may be appropriate.

2. Defendants:

Examination of Plaintiff's Amended Complaint as presently set forth indicates that there are two different issues involved in this dispute—one legal, one factual—both of which demonstrate that Plaintiff's claims are fatally flawed. The following comments are made regarding the Amended Complaint, and thus are made without waiving any rights the Defendant has to challenge the Court's jurisdiction.

Legally, to the extent that Plaintiff seeks to impose liability upon Xcentric for statements authored by a third party, all claims are barred by the Communication Decency Act; 47 U.S.C. § 230 (the "CDA"). The CDA, expressly prohibits civil actions that treat an interactive computer service as the "publisher or speaker" of messages transmitted over its service by third parties. *See generally Doe v. America Online, Inc.*, 783 So.2d 1010 (Fl. 2001). This federal statute, which was passed by Congress with the desire to "promote unfettered speech," provides in relevant part that:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

47 U.S.C. § 230(c)(1). Section 230 further provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Green v. America Online,* 318 F.3d 465, 470 (3rd Cir. 2003) (noting that the CDA, "'precludes courts from entertaining claims that would place a computer service provider in a publisher's role,' and therefore bars 'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions - such as deciding whether to publish, withdraw, postpone, or alter content.'").

The operation of an internet web site which allows access by multiple users is an activity which is unequivocally protected by the CDA. *See Carafano v. Metrosplash.com, Inc. 339 F.3d 1119* (9th Cir. 2003); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37 (Wash.App. 2001). Indeed, every federal court that has considered the issue has held that the CDA immunizes a web site operator for defamatory material it publishes if it is not the creator of the content at issue. *See generally Batzel v. Smith,* 333 F.3d 1018, 1027–28 (9th Cir. 2003) (recognizing, "Making interactive computer services and their users liable for the speech of third parties would severely restrict the information available on the Internet. Section 230 therefore sought to prevent lawsuits from shutting down websites and other services on the Internet.") (quoting *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 983–84 (10th Cir. 2000).

An outstanding analysis of the CDA is set forth in the California Supreme Court's recent opinion in *Barrett v. Rosenthal*, --- Cal.Rptr.3d ----, 2006 WL 3346218 (Cal. Nov. 20, 2006). In fact, as the *Barrett* Court recognized, the CDA has been universally interpreted as providing immunity to interactive websites for content created by a third party. *See Barrett*, 2006 WL 3346218, *18 note 18; (citing *Blumenthal v. Drudge*, 992 F.Supp. 44, 51 (D.D.C. 1998); *Ben Ezra, Weinstein, and Co., Inc. v. America Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Morrison v. America Online, Inc.*, 153 F.Supp.2d 930, 933-934 (N.D.Ind. 2001); *PatentWizard, Inc. v. Kinko's, Inc.* 163 F.Supp.2d 1069, 1071 (D.S.D. 2001); *Green v. America Online*, 318 F.3d 465, 470-471 (3rd Cir. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123-1124 (9th Cir. 2003); *Doe One v. Oliver*, 755 A.2d 1000, 1003-1004 (Conn.Super.Ct. 2000); *Doe v. America Online, Inc.*, 783 So.2d 1010, 1013-1017 (Fla. 2001); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 40-42 (Wn.App. 2001); *Barrett v. Fonorow* 799 N.E.2d 916, 923-925 (Ill.App.Ct. 2003); *Donato v. Moldow* 865 A.2d 711, 720-727 (N.J. Super.Ct.App.Div. 2005); *Austin v. CrystalTech Web Hosting*, 125 P.3d 389, 392-394 (Ariz.App. 2005)).

Secondary authority has also explained that:

> [The CDA's] provisions set up a complete shield from a defamation suit for an online service provider, absent an affirmative showing that the service was the actual author of the defamatory content. Accordingly, a number of courts have ruled that the ISP was immune from liability for defamation where allegedly libelous statements were made available by third parties through an ISP or were posted by third parties on the server's billboards, as the ISP fell within the scope of 47 U.S.C.A. § 230.

Jay M. Zitter, J.D., Annotation—*Liability of Internet Service Provider for Internet or E–mail Defamation* § 2, 84 A.L.R.5th 169 (2000) (emphasis added) (citing Pantazis, Note, *Zeran v America Online, Inc.: Insulating Internet Service Providers From Defamation Liability*, 34 Wake Forest L. Rev. 531 (1999)); *see also Batzel v. Smith,* 333 F.3d 1018, 1027–28 (9th Cir. 2003) (recognizing, "Making interactive computer services and their users liable for the speech of third parties would severely restrict the information available on the Internet. Section 230 therefore sought to prevent lawsuits from shutting down websites and other services on the Internet.") (quoting *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 983–84 (10th Cir. 2000).

Thus, as a matter of law, the CDA prohibits Plaintiff's claims to the extent that they seek to impose liability upon Xcentric for statements authored by a third party.

Factually, it appears that Plaintiff fully understands that the CDA prohibits liability for publication of third party speech, and for that reason it has attempted to avoid this problem by alleging without factual support that Xcentric actually authored/created some part of the material at issue in this case. This allegation is provably untrue. In fact, Xcentric is currently in possession of detailed emails from the principal of Plaintiff admitting that Plaintiff knew, prior to commencing this action, that all allegedly defamatory material was authored solely and exclusively by a third party.

For this reason, a factual matter, Plaintiff's claims regarding Xcentric's authorship of defamatory content in this matter are demonstrably false and direct violations of the prohibition set forth in Fed. R. Civ. P. 11 against baseless litigation. For this reason, upon dismissal of this action, Defendant intends to seek sanctions pursuant to Rule 11 against Plaintiff as well as any other remedies permitted by law.

D. ISSUES RESOLVED:

The issues of jurisdiction, venue and service of all Defendants have been decided by the Court. No other issues have been resolved as of this date.

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E. ISSUES STILL IN DISPUTE:

The issues in dispute in Plaintiff's Amended Complaint as presently set forth are (i) whether Defendants have defamed EASI, (ii) whether Defendants have violated the Tennessee Consumer Protection Act, T.C.A. §§ 47-18-101 et seq., (iii) whether Defendants have engaged in tortious interference with EASI's business relations, (iv) whether Defendants have engaged in a civil conspiracy to use coercion to obtain EASI's property and to develop, create and/or publish defamatory statements regarding EASI, and (v) whether EASI is entitled to compensatory damages, punitive damages, treble damages, attorney's fees and costs, preliminary and permanent injunctive relief, and any other general relief which may be appropriate. Defendant Xcentric reserves the right to raise additional issues in whatever response it may make to the Plaintiff's Amended Complaint.

F. INITIAL DISCLOSURES:

The parties shall exchange initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1) on or before July 25, 2007.

G. DISCOVERY:

The Court shall consider as a threshold issue whether the CDA is a defense to liability with respect to all claims raised in the Amended Complaint. After the Court decides that issue, the Court will conduct a case management conference with respect to the claims, if any, that remain.

The parties shall complete all written discovery and depose all fact witnesses with respect to those issues on or before October 1, 2007. During this first phase of discovery, no discovery shall be had with respect to any issue that is not reasonably calculated to lead to the discovery of admissible evidence on the CDA issue, including, but not limited to, the contents and allegations of the declaration, affidavits and other documents submitted by Xcentric in support of its Motion to Dismiss for Lack of Personal Jurisdiction (Doc. No. 17). Local Rule 9(a)(2) is expanded to allow 40 interrogatories, including subparts. No motions concerning discovery are to be filed until after the parties have conferred in good faith and, unable to resolve their differences, have scheduled and participated in a conference telephone call with Judge Trauger.

H. MOTIONS TO AMEND:

The Court will address motions to amend at the next case management conference.

I. DISCLOSURE OF EXPERTS:

The Court will address disclosure of experts at the next case management conference.

J. DEPOSITIONS OF EXPERT WITNESSES:

The Court will address depositions of expert witnesses at the next case management conference.

K. JOINT MEDIATION REPORT:

The Court will address joint mediation reports at the next case management conference.

L. DISPOSTIVE MOTIONS:

The Defendants shall file a motion for partial summary judgment with respect to the CDA on or before November 1, 2007. A response to Defendants' partial summary judgment motion shall be filed on or before November 21, 2007. An optional reply shall be filed by December 3, 2007. Principal and response dispositive briefs shall not exceed 20 pages, absent leave of Court. Reply briefs shall be limited to 10 pages, absent leave of Court.

M. ESTIMATED TRIAL TIME:

The Court will address estimated trial time at the next case management conference.

It is so **ORDERED.**

ALETA A. TRAUGER
U.S. District Judge

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